



**The Comptroller General  
of the United States**

**Washington, D.C. 20548**

## Decision

**Matter of:** Elastomeric Roofing Associates, Inc.

**File:** B-234125

**Date:** May 12, 1989

## **DIGEST**

Failure of an "equal" product to meet all of the salient characteristics required by solicitation "brand name" requirement properly resulted in the rejection of the bid as nonresponsive.

## DECISION

Elastomeric Roofing Associates, Inc., protests the rejection of its bid under invitation for bids (IFB) No. APHIS-8-039, issued by the United States Department of Agriculture (Animal and Plant Health Inspection Service) for the rehabilitation of the roofs of 17 buildings and for snow guards for two buildings at its New York Animal Import Center. Elastomeric contends that its bid was improperly rejected for failure to submit sufficient information to establish that its silicone roof coating was equal to the brand name product cited in the IFB.

We deny the protest.

The IFB was issued on August 22, 1988. The brand name or equal requirement pertained to silicone roof coating and specified "Dow Corning 3-5000 or equal" coating. The product offered was to meet the following characteristics listed in the IFB:

045416/138638

<u>Property</u>	<u>Test Method</u>	<u>Value</u>
Solids, Contents, % of Volume	ASTM D-26971/	58
Tensile Strength, PSI	ASTM D-412	400
Elongation, %	ASTM D-412	150
Permeability, Perm Inches	ASTM E-96-B	2.9
Weatherometer, 6000 hrs	ASTM 526-70	no degradation

Bidders offering an equal product were required to furnish with their bids all descriptive material necessary to establish compliance with the listed salient characteristics. According to the solicitation, the failure to submit descriptive literature with the bid or to submit sufficient literature to show compliance with those characteristics would result in the rejection of the bid.

Two bids were received on the September 27 bid opening date. Elastomeric submitted a bid of \$167,700 based on offering GCS Coating Inc.'s SILICONE-60-S as an equal silicone coating. The other bidder, Urethane Applications Inc., submitted bid of \$197,567, based on supplying the brand name silicone coating.

The technical data submitted with the protester's bid was reviewed by an architect/engineer (A/E) firm chosen by the agency to evaluate the technical aspects of the bids. The evaluation process was lengthy and included a number of requests by the A/E firm for further information including independent laboratory testing of the offered product to determine that it would meet the listed characteristics. Finally, by letter dated December 27 the agency rejected Elastomeric's bid as nonresponsive. As best we can determine from the rather confusing record, the protester's bid was rejected as nonresponsive because the firm was unable to provide literature or test results showing that its product meet the listed minimum requirements for solids content, permeability and weatherometer.

The protester complains that its bid was improperly rejected as nonresponsive and contends that its product has been accepted by other agencies as equal to the brand name product. In this regard, Elastomeric says that it has shown

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1/ This refers to the American Society of Testing and Materials (ASTM) standard to be used to achieve the listed value.

that its product meets the listed characteristics using the same type of "in-house certification" as accepted from the brand name manufacturer.

Bids offering equal products must conform to the salient characteristics of the brand name product listed in the solicitation in order to be regarded as responsive. Volumetrics, Inc., B-228745, Oct. 23, 1987, 87-2 CPD ¶ 391. A bidder must submit with its bid sufficient descriptive literature to permit the contracting agency to assess whether the equal product meets all the salient characteristics specified in the solicitation. If the descriptive literature or other information reasonably available to the contracting agency does not show compliance with all salient characteristics, the bid must be rejected. Monitronics, B-228219, Nov. 30, 1987, 87-2 CPD ¶ 527. Any information used to establish the equality of a product must have been commercially available prior to bid opening and not have been developed afterwards. Id. To permit a bidder to submit other than preexisting, commercially available data after bid opening would improperly give the bidder control over the responsiveness of its bid. Id.

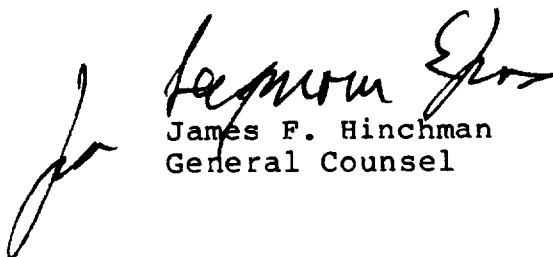
It appears from the record here that although the IFB did not provide for the testing of the product after bid opening the agency's A/E firm did seek and accept test results and other data that seems to have been developed and submitted after bid opening. As indicated above, the acceptance of such data and information--unless it is preexisting, commercially available material, which neither party contends in the case here--is improper in a sealed bid procurement such as this. Since, however, the agency did not accept the protester's bid based on such information, these improprieties did not impact on the award. Further, since these improprieties only benefited the protester it cannot complain that it was prejudiced by the agency's consideration of its post-bid opening data.

We think that the protester's bid was properly rejected since our review of the data submitted with Elastomeric's bid does not show that its silicone covering meet the solid content requirement as established by ASTM D-2697, the permeability level as established by ASTM E-96-B, and it does not appear to address the weatherometer characteristics as set forth in the IFB. It also appears that the testing methodology used to arrive at the elongation and tensile strength figures was not as required by the IFB. Since the protester does not show in an intelligible fashion that the literature submitted with its bid does establish that the product meets the salient characteristics, we have

no basis upon which to object to the rejection of the protester's bid.<sup>2/</sup>

As far as whether the characteristics of the brand name item were subject to less rigorous requirements is concerned, we first note that where a firm offers the brand name item in its bid there was no requirement for the submission of description data concerning the listed salient characteristics. Further, to the extent that the protester is arguing that the characteristics listed in the solicitation are in fact more stringent than the brand name item can actually meet, the argument is one concerning the terms of the solicitation which in order to be timely must be raised prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988). We will therefore not consider it. Finally, the argument that another agency under a prior procurement may have, as Elastomeric contends, considered SILICONE-60-55 as a equal to the Dow Corning product is irrelevant since the agency here cannot make award based on a bid which does not meet the requirements of this particular solicitation. Inscom Electronics Corp., B-225858, Feb. 10, 1987, 87-1 CPD ¶ 147.

The protest is denied.



James F. Hinchman  
General Counsel

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<sup>2/</sup> In fact, the Elastomeric in its protest submission admits that it has not yet submitted data showing compliance with the percentage of solids content and weatherometer requirements and that its data concerning permeability was not provided until after the protest was filed.